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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

TRAVELERS INDEMNITY COMPANY,

and

THE LIBERAL MARKET, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether it was an abuse of discretion and error of law for the Court of Claims to fail to determine the reasonableness of the measures taken by petitioners to prevent or forestall vandals from having access to fuel pumps.

2. Whether the Court of Claims has failed to set a definite standard for review of matters under 33 U.S.C. 1321 (i)(1).

3. Whether the Court of Claims erred in granting summary judgment against petitioners and in favor of respondent after indicating that it needed more facts in order to determine whether petitioner's actions in preventing or forestalling vandals were reasonable.

4. Are the same standards that are applicable to federal district and appellate courts in granting summary judgments applicable to the U.S. Court of Claims when granting summary judgments under its Rule 101, which is like Federal Rules of Court Procedure 56(C).

5. Whether the standard of review under U.S.C. 1321(i)(1) is due care standard like that in tort law or some other standard unlike the tort law standard of due care or ordinary care in doing or failing to do a particular act.

TABLE OF CONTENTS

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	page
Opinions Below.....	1
Jurisdiction.....	2
Statutes Involved.....	2
Questions Presented.....	5
Statement of the Case.....	6
Reasons for Granting Writ.....	8

Appendix

A. Opinion of The United States Court of Claims.....	1a
B. Stipulation of Agreed Facts..	7a

II.

TABLE OF AUTHORITIES

CASES CITED: page

Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144..... 16

American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theaters, Inc. (1967 CA 2 NY) 388 F.2d 272..... 19

Bell Flower v. Pennise (1977 CA 8 Mo.) 548 F.2d 776..... 18

Chenette v. Trustees of Iowa College (1970 CA 8 Iowa), 431 F.2d 49... 20

Eby v. Rab Realty, Inc. (1974 CA 9 Ariz.) 495 F.2d 646..... 18

Empire Electronics Company v. United States (1972 CA 2 NY) 311 F.2d 175..... 19

Fidelity and Deposit Co. v. Bank of Bladenboro (1979 CA 4 NC) 596 F.2d 632..... 18

Hughes v. American JAW, Ltd. (1976 CA 8 Mo.) 529 F.2d 21..... 18

Insurance Company of North America v. Bosworth Construction Construction Company (1972 CA 5 La.) 469 F.2d..... 21

Jaroslawicz v. Seedman (1975 CA 2 NY) 528 F.2d 727..... 21

CASES CITED: page

Madeirense Do Brasil S/A v. Stulman Emrich Lumber Company (1945) CA 2 NY) 147 F.2d 399..... 15

Manetasy International Petroleum Carriers, Inc. (1976 CA 3 NJ) 541 F.2d 408..... 19

Marsden v. Patane (1967 CA 5 Fla.) 380 F.2d 389..... 20

Morrison v. Nissan Motor Co. (1979, CA 4 Md.) 601 F.2d 139..... 19

Parmelee v. Chicago Eye Shield Co. (1946) CA 8 Mo.) 157 F.2d 582..... 17

Pennsylvania v. Curtiss National Bank (1970 Ca 5 Fla.) 427 F.2d 395..... 17

Proctor Wholesale Co. vs. United, 215 Ct. Cl. 1049..... 10

Sprague v. Vogt (1945 CA 8 Minn.) 155 F.2d 795..... 16

United States v. Diebold, Inc. (1962) 369 U.S. 654, 8 L.Ed 2d 176, 82 S.Ct. 993..... 16

United States v. Perry (1970 CA 9 Cal.) 431 F.2d 1020..... 21

Walling v. Fairmont Cramery Co. (1943 CA 8 Neb.) 139 F.2d..... 16

Webb v. Allstate Life Insurance Company (1976 CA 10 Okla.) 536 F.2d 336... 19

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Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Claims entered on March 30, 1982.

OPINIONS BELOW

The opinion of the United States Court of Claims, not reported, is presented in Appendix A hereto. There are no other Court

opinions in this case.

JURISDICTION

The judgment of United States Court of Claims was entered March 30, 1982, and jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

1.) 33 U.S.C. 1321(i)(1), which provides:

> "(i) Recovery of removal costs. (1) In any case where an owner or operator of a vessel or an onshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United

States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission of a third party was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k).

2.) Court of Claims Summary Judgment

Rule 101(d) which provides:

(d) Motion and Proceedings Thereon: After a motion for summary judgment has been filed, and after the expiration of the time allowed for a response thereto or for a reply to the response, if any (Rule 52(b)), such motion may (subject to the provisions of Rules 54(b), 146(b)(2), and 166(b)) be assigned to the calendar. (See Rule 14(b)(2).) The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion and error of law for the Court of Claims to fail to determine the reasonableness of the measures taken by petitioners to prevent or forestall vandals from having access to fuel pumps.

2. Whether the Court of Claims has failed to set a definite standard for review of matters under 33 U.S.C. 1321 (i)(1).

3. Whether the Court of Claims erred in granting summary judgment against petitioners and in favor of respondent after indicating that it needed more facts in order to determine whether petitioner's actions in preventing or forestalling vandals were reasonable.

4. Are the same standards that are applicable to federal district and appellate courts in granting summary judgments applicable to the U.S. Court of Claims when granting summary judgments under its Rule 101, which is like Federal Rules of Court Procedure 56(C).

5. Whether the standard of review under U.S.C. 1321(i)(1) is due care standard like that in tort law or some other standard unlike the tort law standard of due care or ordinary care in doing or failing to do a particular act.

STATEMENT OF THE CASE

The basic facts in this case were stipulated by the parties. This was an original action under 33 U.S.C. 1321(i)(1) brought in the United States Court of Claims.

Petitioner, The Liberal Market, Inc., owned a meat distribution plant. The plant consisted of a large building and parking lot surrounded by a chain-link fence approximately eight to ten feet high. There were railroad tracks parallel to the fence on the south side of the plant and another set of tracks on the north side. There were some residences in the area. At the back of the meat distribution plant there were two diesel fuel pumps inside the fence. On the night of December 11, 12, 1979, unknown vandals

cut through the chain-link fence surrounding the plant, disengaged the fuel nozzles from the diesel fuel pumps, locked the nozzles in the on position thereby allowing diesel fuel to flow out of both nozzles. At the time of the break-in the gates in front of the plant were locked. Liberal had employees at the plant for approximately 21 of any 24 hour period.

As a result of the nozzles being left on, several thousand gallons of diesel fuel ran out of the pumps and into a local creek. Petitioners employed certain companies to perform services to clean-up the diesel spill. Petitioners incurred costs of the amount of $18,048.52 for the clean-up. Petitioner Travelers Indemnity Company was petitioner's Liberal insurer and paid Liberal the sum of $18,048.52 to cover the cost of clean-up. In effect, upon payment by Travelers to Liberal, Travelers became subrogated to Liberal's right

to recovery and Liberal was obligated to reimburse Travelers if Liberal recovered any sum of money in any court action.

An agreed stipulation of facts is attached as Appendix B.

The case was submitted to the Court of Claims on petitioners' motion for summary judgment and on the cross motion for summary judgment by respondent. The Court of Claims issued its decision on March 30, 1982, and granted respondent's motion for summary judgment and denied petitioners' motion for summary judgment and the petition was dismissed. It is from this final order of the Court of Claims that the petitioners have prosecuted its appeal to the Supreme Court.

REASONS FOR GRANTING THE WRIT

If there is an oil spill and a party is ordered by government authorities to clean it up, 33 U.S.C. 1321(i)(1) authorizes a party to sue the United States in the Court of Claims

in order to be reimbursed for costs incurred in removing an oil spill upon establishing that the original discharge of oil was "caused solely by (a) an act of God, (b) an act of War, (c) negligence on the part of the United States Government, or (d) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes."

At issue is whether a "free-wheeling" Court of Claims can make a decision contrary to the facts and law. The Supreme Court's lack of review of Court of Claims decisions has led to a certain degree of "free-wheeling". (See American Bar Association Journal for May, 1982 article regarding National Court of Appeals.) The facts of the case provide an excellent reason for the Supreme Court to review a decision of the Court of Claims and rein in the Court of Claims.

In this particular case, (d) above is the

applicable provision. The question is whether a plaintiff in the Court of Claims must establish that he acted with ordinary due care, as in the tort law standard of due care, or whether a different standard is applicable to cases under 33 U.S.C. 1321(i)(1). The Court of Claims decision in this case stated at page 3 as follows:

> "In the present case, where plaintiff's failure to act has been called into question, it must show that it took adequate precautions to prevent and forestall the vandals and, thereby, satisfy its legal duties to act. Proctor Wholesale Co. v. United States, 215 Ct. Cl. 1049, 1050 (1978)."

It is unclear from the quoted language exactly what legal standard the Court of Claims relied on in deciding the case and it is unclear what burden of proof standard was used. It all depends on how the phrase "caused solely by..." was construed. The potential liability of the United States is great and, therefore, the standard should be certain.

If the standard is the ordinary or due care

standard established in tort law throughout the United States, then it is the Court of Claims's responsibility to determine in each factual situation whether that standard was met on the part of the claimant seeking reimbursement from the government. Thus, it is imperative that the Supreme Court definitely set forth a standard by which the Court of Claims must adjudicate claims under this section. This section is one of the most litigated sections of 33 U.S.C. 1321 because it permits parties to sue the government for cleaning up oil spillages on land, in the ocean or on any body of water.

Petitioners submit that the Court of Claims totally abandoned its judicial duty in deciding this case in the manner it did. The issue presented to the Court of Claims for determination was whether under the facts and circumstances petitioners acted in a reasonable manner and took adequate precautions to pre-

vent and forestall vandals from breaking into the meat plant grounds. The court indicated, beginning at page 3 of its decision, as follows:

> "If the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail. We do not judicially know, and the stipulation does not tell us what precautions are normally expected of persons having on their premises pumps to feed petroleum products into the fuel tanks of business vehicles."

The court further stated at page 4:

> "Plaintiff puts a burden on our unaided perception of what is reasonable, that is simply is unable to bear."

The pertinent facts of this case were stipulated. Petitioners argued that under the facts as presented to the Court they acted reasonably and took adequate steps to prevent vandalism. Whereas the respondent, government, construed the facts as indicating that petitioners did not take reasonable and adequate precautions to prevent or forestall vandals from breaking into the premises and to the pumps.

Thus, the issue was clear: Were petitioners' actions reasonable and were adequate precautions taken to forestall vandalism? The Court of Claims totally avoided deciding this issue and indicated that there were inadequate facts upon which to make a decision of reasonableness and adequate precautions taken. Nevertheless, the court, even though indicating it did not have sufficient facts to make a determination of reasonableness and adequate precautions taken still decided the case against petitioners and dismissed the case.

Petitioners would submit that an action brought under 33 U.S.C. 1321(i)(1) is essentially a negligence type action based on tort principles of ordinary due care. Thus, with this analysis, petitioners only need show that they were not in some manner contributorily negligent which would bar recovery. In order to render a decision in favor of respondent, the Court of Claims would have had to deter-

mine that petitioners were, in some manner, contributorily negligent, and, therefore, barring petitioners' claim for payment. Petitioners would contend that there was a genuine issue of fact: That being whether under the facts and circumstances petitioner's conduct was reasonable or comported with the tort concept of due care.

There was a genuine issue of law as to what standard was to be applied against petitioners in this area. The Court should have compared at least some standard of conduct against petitioner's actions.

The Court could only decide the case on the facts before it. This is did not do. This is shown by the Court's statement on page 3 that:

> "If the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail. We do not judicially know, and the stipulation does not tell us what precautions are normally expected of persons having on their premises pumps to feed petroleum products into the fuel tanks of business vehicles."

The thrust of petitioner's argument is that the

Court was to decide whether in the facts presented petitioners took reasonable and adequate precautions or measures to prevent vandalism to the pumps. A ruling on summary judgment is to be made on record actually present, not on one potentially possible. Madeirense Do Brasil S/A v. Stulman - Emrich Lumber Company (1945) CA. 2 NY.) 147 F.2d 399, cert. den. 325 U.S. 861.

The basis for determining whether the Court shall issue a summary judgment is contained under Rule 101(d) of the Court of Claims rules. This rule is like the summary judgment procedure contained in Federal Rule of Civil Procedure 56(C). In particular, Rule 101(d) states that "the judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment of law."

The Supreme Court has not ruled as to

whether the summary judgment procedure of the Court of Claims must be identical to the procedures and conditions for granting judgments under the Federal Rules of Civil Procedure 56(C). If the same, then the Court of Claims' decision was contrary to established guidelines in deciding summary judgments. The Supreme Court has stated regarding summary judgments that a party moving for summary judgment has the burden of showing absence of a genuine issue as to any material fact, and inferences to be drawn from underlying facts must be viewed in light most favorable to opposing party. Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144, 26 L. Ed. 2d 142, 90 S.Ct. 1598; United States v. Diebold, Inc. (1962) 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993.

It has been stated that all doubts are resolved against the moving party. Walling v. Fairmont Cramery Co. (1943 CA 8 Neb.) 139 F.2d 318; Sprague v. Vogt (1945 CA 8 Minn.) 155

F.2d 795; Parmelee v. Chicago Eye Shield Co. (1946 CA 8 Mo.) 157 F.2d 582. The party opposing motion should be given benefit of every reasonable inference that can be made of evidence in his favor. Pennsylvania v. Curtiss National Bank (1970 CA 5 Fla.) 427 F.2d 395.

In the instant case, the Court of Claims, in its order and decision, has in effect admitted that it did not feel it had adequate facts to decide the key issue of reasonableness and adequate precautions taken but yet rendered a decision against petitioners. Thus, there was a genuine issue as to whether respondent was entitled to judgment as a matter of law on the facts.

It has been held that tort actions are usually not appropriate for disposition for summary judgment since tort actions generally encompass a multitude of factual issues and abstract concepts which become elusive when applied to bearing concrete factual situations.

Hughes v. American JAW, Ltd. (1976 CA 8 Mo.) 529 F.2d 21. The court may render summary judgment in tort or other cases only if after reviewing evidentiary materials in the light most favorable to party opposing motion and giving that party benefit of all inferences reasonably deductible from evidence, the court is convinced upon the trial of the case a verdict in favor of moving party would have to be granted. Bell Flower v. Pennise (1977, CA 8 Mo.) 548 F.2d 776.

Issues of negligence and contributory negligence are "not ordinarily susceptible of summary adjudication under F.R.C.P. 56". Fidelity and Deposit Co. v. Bank of Bladenboro (1979 CA 4 N.C.) 596 F.2d 632. It is the court's duty to ascertain what facts remain in contention even though cross motions are made for summary judgment. Eby v. Rab Realty, Inc. (1974 CA 9 Ariz.) 495 F.2d 646.

Where different inferences can be drawn from the facts, summary judgment should not

be entered. American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theaters, Inc. (1967 CA 2 N.Y.) 388 F.2d 272, later appeal (CA 2 N.Y.) 446 F.2d 1131, cert. den. 404 U.S. 1063.

Where different ultimate inferences of liability may be properly drawn from established facts, case is not one for summary judgment. Webb v. Allstate Life Insurance Company (1976 CA 10 Okla.) 536 F.2d 336; Morrison v. Nissan Motor Co. (1979, CA 4 Md.) 601 F.2d 139.

Cross motions for summary judgment do not warrant the court granting summary judgment unless one of the movants is entitled to judgment as a matter of law. Manetasv International Petroleum Carriers, Inc. (1976 CA 3 N.J.) 541 F.2d 408.

Only where one inference could reasonably be drawn from undisputed evidentiary facts would summary judgment be possible. Empire Electronics Company v. United States (1972 CA 2 N.Y.) 311 F.2d 175.

Even where facts bearing upon issue of negligence are undisputed, if reasonable minds could reach different conclusions and inferences from such facts, issue must be submitted to trier of fact. Marsden v. Patane (1967 CA 5 Fla.) 380 F.2d 489.

Evaluative judgment between two rationally possible conclusions from established facts cannot be engaged in on motion for summary judgment; only where facts supportive of summary judgment can be held to have so unambiguously established actualities of situation as to leave no basis of substance for dispute as to their reality or as to conclusion required from them is summary judgment entitled to be entered. Chenette v. Trustees of Iowa College (1970 CA 8 Iowa), 431 F.2d 49. Summary judgment should not be granted where contradictory inferences may be drawn from undisputed evidentiary facts, even though facts are undisputed, summary judgment is inappropriate if competing reasonable inferences may be drawn

as to any material factual issue. United States v. Perry (1970 CA 9 Cal.) 431 F.2d 1020. Insurance Company of North America v. Bosworth Construction Company (1972 CA 5 La.) 469 F.2d 1266.

It has been held that the responsibility of a district judge on motion for summary judgment is merely to determine whether there are issues to be tried, rather than to try issues themselves, via affidavit and summary judgments cannot be sustained merely because judge believes that party against whom it is entered is unlikely to prevail on merits at trial. Jaroslawicz v. Seedman (1975 CA 2 N.Y.), 528 F.2d 727.

Petitioners request that this Court acting in the nature of a reviewing Court, as a court of appeals would toward district court, review the facts, set a standard and either determine that the actions of petitioners were reasonable and adequate and enter judgment accordingly, or

remand to Court of Claims for a trial or for reconsideration of its summary judgment decision in light of the principles for review of such cases as may be enunciated by this Court.